

REMARKS

Claims 1-75 are pending in the Application. Claims 1-10, 12, 14-19, 21, 23-35, 37, 39-44, 46, 48-60, 62, 64-69, 71, and 73-35 are rejected under 35 U.S.C. § 103. Claims 11, 13, 20, 22, 36, 38, 45, 47, 61, 63, 70 and 72 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. Applicants have cancelled claims 1-75 and added new claims 76-99. Hence, claims 76-99 are pending. Applicants respectfully traverse these rejections for at least the reasons stated below and respectfully request the Examiner to reconsider and withdraw these rejections.

Applicants thank the Examiner for discussing the office action with Applicants' attorney on March 22, 2004.

I. CLAIM OBJECTIONS:

The Examiner has objected to claims 1-75 because, according to the Examiner, "it is not clear whether said first gateway has been restored to its operative status or nothing has been done to the first gateway since the first non-responsive TCP packet was sent." Paper No. 3, page 2. Applicants have cancelled claims 1-75 and therefore the objections to claims 1-75 are moot. However, Applicants will address the Examiner's objections to claims 1-75 in case the Examiner believes that claims 76-99 should be objected to for the same reason.

Applicants respectfully assert that lack of clarity does not provide a basis for objecting to claims. See M.P.E.P. §706.01. Nevertheless, Applicants respectfully assert that the claimed subject matter can be determined by one having ordinary skill in the art. Applicants kindly direct the Examiner to page 11, line 27 – page 13, line 7 of the Specification. The Specification teaches that if TCP does not receive an acknowledgement or receive data from a receiver host, then an Address Resolution Protocol (ARP) entry associated with the first-hop gateway is deleted in the sender host. Page 11, line 27 – page 12, line 1. The Specification further teaches that the application or a new application of the sender host attempts to establish a new

communication, TCP or non-TCP, using the first-hop gateway whose ARP entry was deleted. Page 12, lines 24-26. The Specification further teaches that if the first-hop gateway is operative, then the sender host receives a response from that gateway. Page 13, lines 3-4. The Specification further teaches that if the sender fails to receive a response from that gateway, then the first-hop gateway is inoperative. Page 3, lines 8-12. Consequently, Applicants respectfully assert that the claimed subject matter can be determined by one having ordinary skill in the art. Consequently, Applicants respectfully assert that claims 76-99 are not objectionable for lack of clarity.

II. OBJECTIONS UNDER 35 U.S.C. § 103(a):

Claims 1-10, 12, 14-19, 21, 23-35, 37, 39-44, 46, 48-60, 62, 64-69, 71 and 73-75 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Applicants Background in view of Braden (RFC 1122). Applicants respectfully traverse these rejections for at least the reasons stated below and respectfully request the Examiner to reconsider and withdraw these rejections.

A. The Examiner has not provided any objective evidence for combining Applicants Background with Braden.

A *prima facie* showing of obviousness requires the Examiner to establish, *inter alia*, that the prior art references teach or suggest, either alone or in combination, all of the limitations of the claimed invention, and the Examiner must provide a motivation or suggestion to combine or modify the prior art reference to make the claimed inventions. M.P.E.P. §2142. The showings must be clear and particular. *In re Lee*, 277 F.3d 1338, 1343, 61 U.S.P.Q. 2d 1430, 1433-34 (Fed. Cir. 2002); *In re Kotzab*, 217 F.3d 1365, 1370, 55 U.S.P.Q. 2d 1313, 1317 (Fed. Cir. 2000); *In re Dembiczak*, 50 U.S.P.Q.2d. 1614, 1617 (Fed. Cir. 1999). Broad conclusory statements regarding the teaching of multiple references, standing alone, are not evidence. *Id.*

The Examiner's motivation for modifying Applicants' Background with Braden (1) to delete an Address Resolution Protocol (ARP) entry associated with a

first gateway in the sender host is "because clearing up the ARP entries relating to a failed gateway can reserve memory space for the alternative gateway." Paper No. 3, page 4. This motivation is insufficient to support a *prima facie* case of obviousness since it is merely the Examiner's subjective opinion.

The Examiner must submit objective evidence and not rely on his own subjective opinion in support of modifying Applicants' Background' to delete an ARP entry associated with a gateway in the sender host. *In re Lee*, 61 U.S.P.Q.2d 1430, 1434 (Fed. Cir. 2002). There is no suggestion in Applicants' Background of deleting an ARP entry. Since the Examiner has not submitted objective evidence for modifying Applicants' Background to delete an ARP entry associated with a gateway in the sender host, the Examiner has not presented a *prima facie* case of obviousness for rejecting claims 76-99. *Id.*

Further, the Examiner must submit objective evidence and not rely on his own subjective opinion in support of modifying Applicants' Background to clear up ARP entries relating to a failed gateway to preserve memory space for an alternative gateway (Examiner's motivation). *Id.* There is no suggestion in Applicants' Background of preserving memory space. Further, there is no suggestion in Applicants' Background of clearing ARP entries in order to preserve memory space for an alternative gateway. Since the Examiner has not submitted objective evidence for modifying Applicants' Background to clear up ARP entries relating to a failed gateway to preserve memory space for an alternative gateway, the Examiner has not presented a *prima facie* case of obviousness for rejecting claims 76-99. *Id.*

Further, the Examiner has not provided a motivation for modifying Applicants' Background to send an ARP request to a gateway upon the deletion of the ARP entry associated with that gateway, as recited in claim 76 and similarly in claims 84 and 92. As stated above, the Examiner must provide a motivation or suggestion to combine or modify the prior art reference to make the claimed inventions. M.P.E.P. § 2142. As the Examiner has failed to provide a motivation to modify Applicants' Background to send an ARP request to a gateway upon the deletion of the ARP entry associated with that gateway, the Examiner has failed to

provide a *prima facie* case of obviousness for rejecting claims 76-99. M.P.E.P. § 2142.

B. Applicants' Background and Braden, taken singly or in combination, do not teach or suggest the following claim limitations.

Applicants respectfully assert that Applicants' Background and Braden, taken singly or in combination, do not teach or suggest "sending an ARP request to said first gateway upon deletion of said ARP entry, wherein if a response to said ARP request is not received from said receiver host, then said first gateway is inoperative" as recited in claim 76 and similarly in claims 86 and 92. The Examiner cites Section 3.3.1.4 of Braden as teaching the above-cited claim limitation. Paper No. 3, page 5. Applicants respectfully traverse and assert that Braden instead teaches that the failure to ARP may be used as negative advice to determine dead gateway detection. While Braden teaches that failure to receive feedback from an ARP request may indicate a dead gateway¹, there is no language in Braden that teaches sending an ARP request upon deletion of an ARP entry associated with the gateway that failed to return an acknowledgment of received data from the receiver host. That is, there is language in Braden of clearing the ARP entry and forcing a new ARP request to be sent to determine whether the gateway is inoperative. If a response is not received from the new ARP request, then the gateway may be deemed to be inoperative.² Therefore, the Examiner has not presented a *prima facie* case of obviousness, since the Examiner is relying upon an incorrect, factual predicate in support of the rejection. *In re Rouffet*, 47 U.S.P.Q.2d 1453, 1455 (Fed. Cir. 1998).

Claims 77-85, 87-91 and 93-99 recite combinations of features, including the above combinations, and thus are patentable for at least the above reasons as well. Claims 77-85, 87-91 and 93-99 recite additional features, which, in combination with the features of the claims upon which they depend, are patentable over Applicants' Background in view of Braden.

¹ The gateway may be deemed to be inoperative after the connection timing out which may take up to 20 minutes of loss of connectivity.

² The gateway may be determined to be inoperative prior to the connection timing out.

For example, Applicants' Background and Braden, taken singly or in combination, do not teach or suggest "selecting an alternative path to send a packet of data from said sender host to said receiver host through a second gateway in a routing table in said sender host if said response to said ARP request is not received from said receiver host" as recited in claim 77 and similarly in claims 83 and 89. The Examiner cites page 3, lines 22-26 of Applicants' Background as teaching the above-cited claim limitation. Paper No. 3, page 3. Applicants respectfully traverse and assert that the cited passage instead teaches that the host may be able to select another route to a different router or gateway to send the TCP traffic if TCP provides feedback to the host indicating that the transmission is failing. However, there is no language in the cited passage that teaches sending an ARP request to a gateway upon deletion of an ARP entry associated with that gateway. Further, there is no language in the cited passage of selecting an alternative path if a response to that ARP request is not received from the receiver host. Therefore, the Examiner has not presented a *prima facie* case of obviousness, since the Examiner is relying upon an incorrect, factual predicate in support of the rejection. *In re Rouffet*, 47 U.S.P.Q.2d 1453, 1455 (Fed. Cir. 1998).

Applicants further assert that Applicants' Background and Braden, taken singly or in combination, do not teach or suggest "marking routes that use said first gateway to a lower priority level in said routing table in said sender host" as recited in claim 78 and similarly in claims 79, 84, 85, 90 and 91. The Examiner states that Applicants' Background and Braden do not specifically teach the above-cited claim limitation. Paper No. 3, page 5. The Examiner asserts that "it is well known in the art [to] rank a potentially unavailable gateway, such [as] the ones undergoing diagnostic or fault recovery process." Paper No. 3, page 5. Applicants respectfully traverse the implied assertion that is well known in the art to mark routes that use a gateway to a lower priority level from the original priority level in the routing table in the sender host. Applicants respectfully request the Examiner to provide a reference that supports the Examiner's assertion that is well known in the art to mark routes that use the first gateway to a lower priority level from an original priority level in the routing table in the sender host pursuant to M.P.E.P. § 2144.03. Therefore, the

Examiner has not presented a *prima facie* case of obviousness, since the Examiner is relying upon an incorrect, factual predicate for the rejection. *In re Rouffet*, 47 U.S.P.Q.2d 1453, 1455 (Fed. Cir. 1998).

Further, the Examiner's motivation for modifying Applicants' Background with Braden to mark routes that use the first gateway to a lower priority level from an original priority level in the routing table in the sender host, as recited in claim 78 and similarly in claims 79, 84, 85, 90 and 91, is "[to] lower the risk of attempting for a failed gateway before it becomes fully functional again." Paper No. 3, page 5. This motivation is insufficient to support a *prima facie* case of obviousness, since it is merely the Examiner's subjective opinion.

The Examiner must submit objective evidence and not rely on his own subjective opinion in support of modifying Applicants' Background so that it would lower the risk of attempting for a failed gateway before it becomes fully functional again. (Examiner's motivation). *In re Lee*, 61 U.S.P.Q.2d 1430, 1434 (Fed. Cir. 2002). The Examiner's motivation appears to have been gleaned from Applicants' disclosure. Any judgment of obviousness must not include knowledge gleaned only from Applicants' disclosure. *In re McLaughlin*, 170 U.S.P.Q.2d 209, 212 (C.C.P.A. 1979). Hence, this is not evidence as to why one of ordinary skill in the art with the primary reference (Applicants' Background) in front of him would be motivated to modify the primary reference (Applicants' Background) with the teachings of the secondary reference (Braden). Consequently, the Examiner's motivation is insufficient to support a *prima facie* case of obviousness for rejecting claims 78, 79, 84, 85, 90 and 91. *In re Lee*, 61 U.S.P.Q.2d 1430, 1434 (Fed. Cir. 2002).

Further, the Examiner must submit objective evidence and not rely on his own subjective opinion in support of modifying Applicants' Background to mark routes that use a gateway to a lower priority level from an original priority level in the sender host. *In re Lee*, 61 U.S.P.Q.2d 1430, 1434 (Fed. Cir. 2002). There is no suggestion in Applicants' Background of marking routes that use a particular gateway to a lower priority level. Further, there is no suggestion in Applicants' Background of marking routes that use a particular gateway to a lower priority level from an original

priority level in a routing table in the sender host. Since the Examiner has not submitted objective evidence for modifying Applicants' Background to mark routes that use a particular gateway to a lower priority level from an original priority level in the routing table in the sender host, the Examiner has not presented a *prima facie* case of obviousness for rejecting claims 78, 79, 84, 85, 90 and 91. *In re Lee*, 61 U.S.P.Q.2d 1430, 1434 (Fed. Cir. 2002).

Applicants further assert that Applicants' Background and Braden, taken singly or in combination, do not teach or suggest "sending a non-TCP packet of data to said receiver host through said second gateway using said alternative gateway" as recited in claim 80 and similarly in claims 89 and 96. Therefore, the Examiner has not presented a *prima facie* case of obviousness for rejecting claims 80, 88, and 96. M.P.E.P. § 2143.

Applicants further assert that Applicants' Background and Braden, taken singly or in combination, do not teach or suggest "sending a second TCP packet to said receiver host through said second gateway using said alternative gateway" as recited in claim 81 and similarly in claims 89 and 97. Therefore, the Examiner has not presented a *prima facie* case of obviousness for rejecting claims 81, 89 and 97. M.P.E.P. § 2143.

As a result of the foregoing, Applicants respectfully assert that there are numerous claim limitations not taught or suggested in the cited prior art, and thus the Examiner has not presented a *prima facie* case of obviousness for rejecting claims 76-99 as being unpatentable over Applicants' Background in view of Braden.

III. CONCLUSION

As a result of the foregoing, it is asserted by Applicants that claims 76-99 in the Application are in condition for allowance, and respectfully request an allowance of such claims. Applicants respectfully request that the Examiner call Applicants' attorney at the below listed number if the Examiner believes that such a discussion would be helpful in resolving any remaining issues.

Respectfully submitted,

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